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REUNIFYING PROPERTY*

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Like the metaphorical bundle of sticks that Property professors invoke to illustrate the evolution of the concept of property from a unified whole to an infinitely divisible and fungible set of rights, the property course has become a bundle of topics that professors can liberally mix and match. But such malleability has come at a high cost. Students suffer when their property course lacks a cohesive framework upon which they can layer other concepts and subjects in advanced courses. Few students, save those with photographic memories, are able to retain much from a course that comes across as disconnected bodies of doctrine whose only common element may be that they involve land. More generally, the law school curriculum suffers because professors in upper level courses cannot be sure students have acquired the foundational concepts upon which they can build their courses.

This lack of cohesion has eroded Property's place in the firmament of first-year courses. Unlike the other first-year courses, which have retained central organizing themes—Contracts (private ordering through assent), Tort (default rules for assigning responsibility for accidents), Civil Procedure (rules for litigating disputes), and Criminal Law (justifications and rules for punishing crimes)—Property has devolved into a disparate set of doctrinal areas loosely tied together by their relationship to land. Each Property professor has his or her potpourri of coverage, and most modern property books largely reflect and cater to that eclecticism. Although only one school (Yale) has demoted Property to elective status, many law schools, including our own, have reduced the number of credit hours absolutely and in relation to the other first-year courses; some have moved it to the second semester or offer it during either semester, further evidence that Property is less essential.

This de-emphasis of Property finds some support in legal scholarship. In a provocative essay published two decades ago, Professor Thomas Grey argued that the field of property "ceases to be an important category in legal and political theory" as a result of the "disintegration" of the conception of

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property.[1] In his view, dividing property ownership into a "bundle of rights" and developing differing conceptions of property across disciplines have "fragmented" property theory "into a set of discontinuous usages."[2] Numerous scholars have questioned Grey's claims on a range of bases,[3] yet Grey's observation about the disintegration of property still resonates today; there is no overarching conception unifying the many elements of the field in a deep and intuitive way. The traditional unifying theory—Hohfeldian's correlatives[4]—is principally definitional. The justificatory theories stand largely disassociated from the richness of real world property institutions. The burgeoning literature on property institutions has illuminated the many governance regimes beyond private property, but has not provided an integrated and generally accepted comparative framework for integrating these diverse strands.[5] Robert Ellickson's *Property in Land*[6] provides the most comprehensive effort to date at synthesizing the various strands of property

1. Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980). *See also* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001).

2. *Id*. at 72.

3. Professor Munzer, in particular, provides a persuasive critique of Grey's premises and logical deductions. STEPHEN R. MUNZER, A THEORY OF PROPERTY 31-36 (1990). Judging from the proliferation of property scholarship on property theory over the past decade, there is little question that the field of property is vibrant today. *See, e.g.*, MANAGING THE COMMONS (John A. Baden & Douglas S. Noonan eds., 2d ed. 1998); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); MARGARET J. RADIN, REINTERPRETING PROPERTY (1993); CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP (1994); Joseph Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433 (1993); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988).

4. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTS AS APPLIED IN JUDICIAL REASONING 23-114 (1919); LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATION 7-23 (1977). *See also* A.M. Honore, Ownership, *in* OXFORD ESSAYS IN JURISPRUDENCE 107-47 (A.G. Guest ed., 1st series 1961). This conception is reflected in the American Law Institute's Restatement of the Law of Property.

5. Professor Neil Komesar's work broadly conceptualizes all of law and public policy within a comparative institutional framework. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994). While properly calling attention to the importance of institutional choice, Komesar's framework operates at too general a level to expose many of the distinctive aspects of governing resources. Furthermore, the model of politics upon which he bases his analysis—the interest group theory of politics—represents but one of the major political theories important to understanding property institutions.

6. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

theory into a positive model, but it limits its scope to land and focuses principally upon one critical element of land regimes: parcelization versus group ownership.

In our view, the perception that a property course is somehow less foundational to the study of law reflects the lack of a cohesive framework for organizing the course rather than a reduced importance of Property to the law school curriculum, the practice of law or the formation of public policy. To the contrary, there is every reason to believe that the production and allocation of resources continue to represent central problems in modern societies. Ironically, the growing importance of a wider range of resources—beyond simply land—has contributed to the erosion of the intellectual coherence of the property course, and at the same time has illustrated the need for a unifying intellectual framework.

It was this challenge that prompted us to write a new coursebook for property law.[7] Although we covered the disparate areas that professors commonly pull into the property course, we developed an organizational structure that weaves together the various subjects in a cohesive and intuitive manner and that serves as a foundation for the broad range of subjects covered in law school: from environmental law to intellectual property, trusts and estates, real estate, administrative law, local government law, land use planning, business associations, bankruptcy, tax and family law.

Our point of departure is the basic observation that one of the central problems of every society throughout history has been the governance of resources. Land is obviously an important category, and historically, often has been the most important resource, but it is by no means the only important resource, and its relative importance varies over time and across societies. In today's economy, for example, information—knowledge and ideas—plays a much greater role than it did a century ago when Christopher Columbus Landgell devised his blueprint for the "modern" law school curriculum. Even though it may emphasize real property as a resource, a truly foundational property course must provide a conceptual framework that applies to the full panoply of resources.

From this starting point, it became clear that there are many different means of governing property and that we need both a language and a framework to describe how such governance occurs and evolves over time. The literature on comparative institutional analysis provides such a vocabulary and the tools for developing such a framework. Although one institution may dominate the governance of resources for a particular society at a particular point in time—and clearly private property, a mixture of default ownership rules and market exchange, played such a role at the time that Langdell

7. JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE (1998).

constructed the first-year curriculum long ago—any theory of governance also must allow for the operation of other institutions, such as social norms and politics.

By changing the organizational structure for the course from a particular resource (land) and a particular institution (judge-made rules) to a comparative institutional analysis—one that looks at default legal rules, social norms, markets and political institutions—we have developed a cohesive understanding of the governance of all kinds of resources and an appreciation of the strengths and weaknesses of the major governance institutions. This orientation updates the first-year curriculum in other important ways. The traditional first-year subjects, drawn as they are from the common law mold of the late nineteenth century, overemphasize the role of legal institutions and common law.[8] However, a property course organized around the principal institutions of governance is more adapted to today's legal environment and the practice of law. Such a course can teach not only about the range of governance institutions, but also about the processes underlying their operation. In this way, the approach that we advocate can be seen as an effective way of integrating the concepts set forth by Hart and Sacks in their widely admired, but rarely taught *The Legal Process*,[9] into a substantive first-year course.

Implementation is key. At first blush, this approach may seem to engage students in more abstract theory than most professors may want to explore; in fact, our course allows professors to cover the same substantive topics. But as the course moves among these topics, students can see how the subjects and concepts fit within a larger, coherent landscape that puts the law school curriculum, the practice of law and the relation of law and society in sharper focus. Thus, students derive a significant additional benefit: a means for organizing key concepts that will serve them well in a wide range of advanced courses—the very reason for including a course in the mandatory first year curriculum—and the practice of law. As with Contracts, Torts, Civil Procedure and Criminal Law, Property can be summarized in a phrase: exploring and comparing the principal institutions for governing resources.

I. DEVELOPING A CONCEPTUAL FRAMEWORK FOR THE PROPERTY COURSE

Many property casebooks have a common starting point: *Johnson v. M'Intosh*, the foundational case setting forth the American origins of property

8. Had the law school curriculum been developed following the New Deal, the role of the state, statutes (and statutory interpretation) and administrative law undoubtedly would occupy a more prominent role in the first-year curriculum, including Property.

9. HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994) (prepared for publication from the 1958 Tentative Edition by William N. Eskridge, Jr., and Philip P. Frickey).

rights as between native peoples and European colonists. As Professor Singer explains in his contribution to this symposium, this case represents a logical starting point for developing an understanding of the *law* of property.[10] Yet, this case creates the feeling that students are entering the river at midstream. Surely the native peoples had governance institutions before the Europeans arrived. Whether or not Justice Marshall was right largely to override native property rights, it seems worth exploring how native Americans governed land and natural resources, just as it makes sense to think about how Europeans governed land and natural resources. Underlying this inquiry is our belief that successful lawyers must be able to think about more than what the formal law says; they must be able to think about the range of governance—default legal rules, social norms, markets and political institutions—that is available to achieve their client's objective(s).[11]

Thus, even before learning the formal law, students need a theory about the governance of resources. The real story underlying *Johnson v. M'Intosh* illuminates just such a theory. Many students find Justice Marshall's disparaging portrayal of native peoples' use and enjoyment of the land and natural resources deeply troubling. And they are correct. Far from living barbarous, ignorant and unprincipled lives, native peoples possessed a rich understanding of the land and other resources on which they lived and had developed stable and effective governance institutions. These institutions differed radically from those of the colonists, and these differences, rather than the decision itself, is the ideal starting point for the property course because it enables students to focus on the core problem facing individuals, organizations, communities and societies—the governance of resources. Thus, while *Johnson v. M'Intosh* is an important decision for understanding property law, and it is the first *case* that we cover, the deeper importance derives from its comparison of different cultures' resource governance regimes.

This starting point reveals an intriguing puzzle: *how can the same resources—the land, wild animals, fruits and berries, forest resources, fish, ocean resources, dwellings, tools—be governed so differently in the two communities?* Inviting students to explore this puzzle illuminates the governance of resources and provides the key to reunifying property.

10. *See* Joseph William Singer, *Starting Property*, 46 ST. LOUIS U. L.J. 565 (2002).

11. In the United States today, study of law opens up a wide range of career paths, from working in traditional law practice to politics, business and civic affairs. In the high technology world, lawyers work closely with entrepreneurs in navigating uncharted waters. Even lawyers in more traditional jobs have occasion to deal with political and social institutions. And even the most narrowly focused litigators must, when a settlement offer is on the table, be able to assist their client in weighing alternatives.

A. Understanding the Governance of Resources in Early New England

After a brief review of the principal philosophical traditions, we bring students back to New England at the time that the colonists arrived, long before *Johnson v. M'Intosh* was decided. Historian William Cronon's *Changes in the Land: Indians, Colonists, and the Ecology of New England*[12] provides the time portal. His richly textured portrayal of the manner in which native and colonial communities lived brings the reader back in time to villages and towns of early New England. By excerpting the principal descriptive chapters of Cronon's book, we are able to expose students—on the basis of sound historical research (as opposed to Justice Marshall's poorly informed and culturally biased preconceptions)—to a richly detailed account of life at the time of colonization. In the course of these excerpts, Cronon masterfully highlights the governance structures of the different communities and reinforces an important point: resource governance institutions form an important part of the fabric of every community.

Students quickly recognize that there are many effective ways to govern resources. European settlers transplanted much of their community structure and institutions, including property regimes based principally (although not exclusively) upon private property and market exchange. They established fixed settlements based on agriculture and domesticated grazing animals. Their intensive farming methods and their enclosure of the land with fences soon reshaped the landscape and ecology of New England.

By contrast, native villages throughout the New England region incorporated the annual cycles of wild migratory birds, mammals, fish and shellfish into their dietary patterns. In areas south of the Kennebec River in Maine, native communities also raised crops as part of their annual cycle. These patterns were supported by complex institutions—in which property was often held collectively—that were adapted to the native communities' seasonal mobility and land uses.[13] Individuals had clear and full ownership rights in things they made,[14] but given the limitations on the accumulation of belongings imposed by a mobile lifestyle, individual ownership was largely limited to functional objects used in a person's tasks. Even with such items, sharing was common. With regard to land, kinship groups, not individuals, often had territorial claims.[15] In southern New England, families had exclusive use of land for planting and habitation, although these lands were used only for a few years and then left barren until natural processes rejuvenated the

12. WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983).

13. *See id*. at 58-68.

14. *Id.* at 61.

15. *Id.* at 58-59.

productivity of the soil, after which the lands could be claimed by others.[16] The right was really only a usufruct; no permanent boundaries were marked and the identities of the users of the land would shift over time. The Indians also had relatively flexible notions of rights in other productive lands, such as clam banks, hunting grounds and berry-picking areas. The Indians had rights to what they gathered, captured or made (for instance, canoes), but only a temporary use right in the land itself.[17]

Thus, the puzzle that we formulated at the outset—*How can the same resources— the land, wild animals, fruits and berries, forest resources, fish, ocean resources, dwellings, tools—be governed so differently across communities?*—has an answer, but not the one suggested by Justice Marshall.[18] Cronon's account reveals that there is not a one-to-one relationship between governance institutions and resources. Both societies developed successful, although not necessarily compatible,[19] resource governance institutions. Although the nature of the resources played some role in how they were governed, a set of other factors—knowledge, history, technology, community size and religious beliefs—played an important role in determining the institutions used to govern resources. For example, colonists' knowledge of metallurgy afforded them the axe, which made possible splitting of wood for fence posts, and thus individual parcels for intensive agriculture and raising livestock. Similarly, the Indians' knowledge of the seasonal food chains resulted in mobile societies that did not rely on fixed land boundaries and relatively little private property.

16. *Id*. at 62.

17. CRONON, *supra* note 12, at 63.

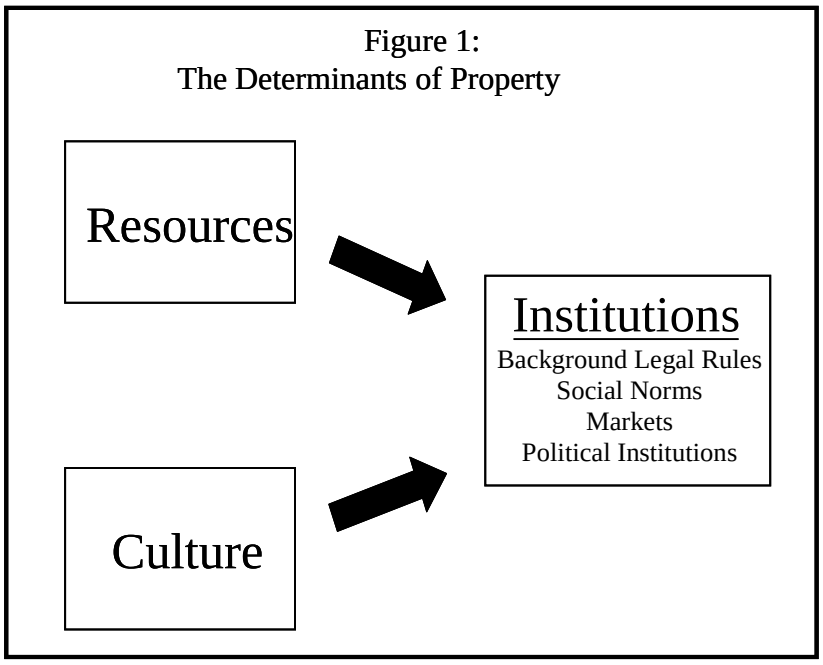
18. As Cronon reveals, the Europeans' views were driven more by their own cultural preconceptions than the actual living standards of native communities. The native peoples lived in a manner that provided sustenance and security, although in dramatically different ways than the colonists sought to satisfy their human desires. The native communities had customs and governance structures highly attuned to the seasonal cycles of their regions. As Cronon explains, "[j]ust as a fox's summer diet of fruit and insects shifts to rodents and birds during the winter, so too did the New England Indians seek to obtain their food wherever it was seasonally concentrated in the New England ecosystem." *Id*. at 37. To take advantage of these cycles, native peoples developed a mobile lifestyle. Villages, consisting of extended kinship groupings ranging up to a few hundred members, migrated in regular annual patterns among ecological niches most hospitable for food gathering and production.

19. The differences in property institutions played an important role in the tensions that arose between native and colonist communities. The seasonal and usufructory understandings of property rights among native peoples conflicted with the notion of absolute and exclusive rights in land of the Europeans, resulting in tension over the meaning of land transactions. *See id*. at 69-70.

B. The Triadic Relation

Cronon's account leads naturally to an understanding of property as shaped by a triadic relation among the nature of the resource, the cultural dimensions of the society, and the society's choice of governing institutions (see Figure 1, *infra*). A governance structure for a particular resource comprises the combination of institutions—social, background legal (default rules), market (contract), and political (legislation or administrative control, meaning, zoning)—controlling that resource. Our initial premise is that such governance structures are determined by the nature of the resource itself and the attributes of the society or culture in which the resource is situated. The nature of the resource relates principally to its technical attributes, such as the difficulty of capture, its use, its regenerative ability and its interaction with other resources. Even in the case of land, there is a remarkable complexity and variation of the resource as reflected in Cronon's elaboration of native communities' complex methods of land use. The attributes of the society are also critical to the governance regime, in that its culture—broadly defined and reflected in the cohesiveness of the members, knowledge base (relating to resources, technology and experience with alternative governance institutions), religious beliefs, social values, system of political organization and size of the community, among other attributes—helps to determine the efficacy of different institutions.

Figure 1:
The Determinants of Property



The central story of Cronon's book—"Changes in the Land (or ecology)" of New England following colonization—demonstrates that the triadic relation is not static, but dynamic. The patterns of native peoples—particularly their mobility and limited resource use—minimized human effects on ecosystems,[20] notwithstanding a native population in the region of 70,000 to 100,000 inhabitants at the turn of the seventeenth century.[21] By contrast, the transplantation of English customs and property institutions, especially private property in land, supported a more fixed lifestyle and encouraged intensive use of the resource base. Even though the population of colonists had not yet reached 100,000 by the turn of the eighteenth century,[22] English settlements had already altered the ecology of New England in dramatic and irreversible ways. By the end of the eighteenth century,

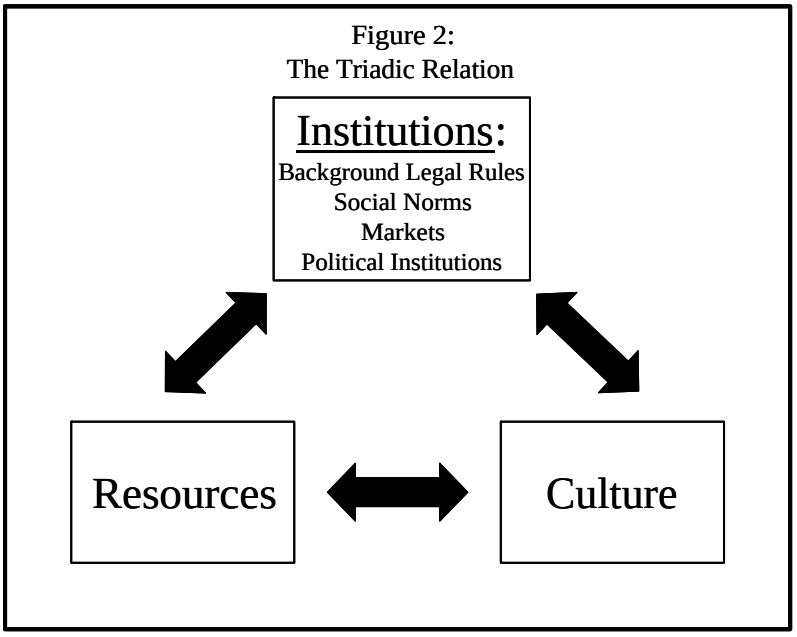
> [l]arge areas particularly of southern New England were now devoid of animals which had once been common: beaver, deer, bear, turkey, wolf, and others had vanished. In their place were hordes of European grazing animals which constituted a heavier burden on New England plants and soils. Their presence had brought hundreds of miles of fences. With fences had come the weeds: dandelion and rat alike joined alien grasses as they made their way across the landscape. New England's forests still exceeded its cleared land in 1800, but, especially near settled areas, the remaining forest had been significantly altered by grazing, burning, and cutting . . . .
>
> Deforestation had in general affected the region by making local temperatures more erratic, soils drier, and drainage patterns less constant. A number of smaller streams and springs no longer flowed year-round, and some larger rivers were dammed and no longer accessible to the fish that had once spawned in them. Water and wind erosion were taking place with varying severity, and flooding had become more common. Soil exhaustion was occurring in many areas as a result of poor husbandry, and the first of many European pests and crop diseases had already begun to appear.[23]

In other words, the colonists' culture and governing institutions eventually changed the resource. Accordingly, Figure 2 reorients the triadic relation to illustrate this temporal dimension. In essence, changes in the nodes of the triadic relation—resources, culture and institutions—induce changes in the other components of the framework. Over time, resources and culture not only determine governance structures, but governance structures also affect the resource base and the culture. Moreover, such feedback loops play an integral role in the evolution of the governance of resources. By learning Property through this representation, law students come to appreciate the dynamic

20. *See id.* at 53.
21. *Id*. at 42.
22. CRONON, *supra* note 12, at 42.
23. *Id.* at 159-60.

nature of resource governance institutions, and are better prepared for the practice of law, where they will need to work effectively with various governance institutions—courts, social organizations, markets and business enterprises, and political institutions—in addressing their clients' interests.

Figure 2:
The Triadic Relation



We bring out these dynamic elements throughout the course. Take, for example, the classic case of *Pierson v. Post*,[24] which explores the rules governing ownership of captured animals. This nineteenth century gem illustrates many lessons about judicial reasoning, the origins of legal doctrines and the rules governing wild animals at the turn of the nineteenth century, but it would be wholly misleading to leave students with the impression that this decision still governs ownership of wild animals to any significant degree. Partly in response to the devastating effects of population growth and new technologies (such as more accurate firearms and more effective means for safeguarding chickens—such as chicken wire) on wildlife populations, the institutions governing wildlife evolved dramatically and now provide for the regulation and conservation of wildlife.[25] Toward the latter part of the nineteenth century, the state ownership doctrine eventually resulted in the

24. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

25. *See generally* DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS (2002); Dean Lueck, *Wildlife Law*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 696-700 (Peter Newman ed., 1998); Dean Lueck, *Property Rights and the Economic Logic of Wildlife Institutions*, 35 NAT. RESOURCES J. 625 (1995).

formation of state game agencies. In 1916, the United States entered into the Migratory Bird Treaty Act establishing joint control with Mexico and Canada of migratory birds. In 1973, the United States passed the Endangered Species Act, which protects endangered species and their habitats. In that same year, the Convention in International Trade in Endangered Species (CITES) was established to stop trade in endangered species. Thus, over the course of two centuries, the governance of these resources dramatically shifted in response to changes in the nature of the resource as well as the societies in which they were situated.

II. ASSEMBLING THE PROPERTY COURSE

There remains the practical question of how to organize the diverse topics and concepts of property law. Governance institutions provide the answer. Much of the traditional common law material—acquiring property, forms of property, scope and limitations of property rights and transferring property—fit within a chapter on traditional legal institutions—what we refer to as "background legal rules." A chapter on social norms, using a range of case studies, illustrates circumstances in which informal governance mechanisms operate, how they form and evolve, and their relationship to formal means of governance. A chapter on market institutions draws together those bodies of doctrine relying principally upon market exchange—landlord-tenant, non-possessory interests and common interest communities. The study of common interest communities provides an ideal transition to the final chapter on political institutions. This chapter focuses on zoning as a means for exploring the strengths and limitations of administrative and quasi-democratic means of governing resources.

By the end of the course, students understand that just as there is more than one way to skin a cat (a regrettable, but apt, metaphor), there is more than one way to govern a resource. Although some property books illustrate this point by juxtaposing nuisance law, non-possessory interests and zoning, none makes this point generally and all typically omit the role of informal governance institutions (social norms); nor do they compare the applicability of different governance regimes to non-land resources, such as intellectual property, water or oil and gas. Yet these are critical lessons for students as they prepare for upper level courses and the practice of law. Even in our ostensibly private property system, where one would expect markets to dominate, resources are governed by a confluence of background legal rules, social norms and political institutions, as well as markets.

Thus, we feel that the best method of organizing a property course is on the basis of the major governance institutions: background legal rules (principally, although not exclusively, common law doctrines), social norms, markets and political institutions. At the beginning of each unit, we present the general and distinctive features of the institutional mechanism and decisional processes.

As the course proceeds, we contrast the different institutional structures. Thus the comparative institutional character of the course expands as the course progresses, enabling students to grasp the full institutional panorama by the end of a one-semester course. In the real world with all of its complexities, of course, the governance of resources cannot always be neatly divided among particular institutions. Landlord-tenant law, for example, is a mixture of markets and politics (such as rent control boards). Property disputes between neighbors may involve some combination of background legal rules (such as trespass and nuisance) and social norms. But identifying traditional areas of property law with the dominant governance institution helps students both to understand the particular rules in a larger context and to see the limitations of that institution and the ways the law has adapted accordingly.

The following sections explain how we implement our framework and where and how we integrate fundamental concepts within a property course structured around governance institutions.

A. Chapter 1: An Introductory Exploration

To provide students with the conceptual structure for the property course, we begin, as noted above, with the story of early New England. We preface these materials with a brief overview of the principal philosophical justifications for property: Locke's labor theory, personhood, distributive justice and utilitarianism. Many law students have been exposed to some of this material in their undergraduate programs and a brief refresher focused on the justifications for property ownership provides a common vocabulary for understanding particular rules and approaches. For students without previous exposure to this material, the primer serves as a valuable introduction to argumentation and moral reasoning.

The major focus of the introductory chapter is the comparative case studies of resource governance in colonial New England. We augment this descriptive material with one of the major theories of the origins of private property: Demsetz's account of the evolution of private property.[26]

The last part of our introductory chapter presents three concise case studies involving ownership of complex ocean resources: whales,[27] oysters[28] and lobsters.[29] Each of the case studies illustrates distinctive governance structures that vary with the resource and the community in which the resource is governed.

26. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

27. *See* Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989).

28. Richard J. Agnello & Lawrence P. Donnelley, *Property Rights and Efficiency in the Oyster Industry*, 18 J.L. & ECON. 521 (1975).

29. JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE (1988).

This introductory chapter exposes students to the richness and range of property institutions and the ways in which governance of resources affects societies. For many students, these materials serve as a valuable bridge from their liberal arts undergraduate studies—history, anthropology, philosophy, literature, economics, sociology and political science—to their legal studies. They also emphasize the role of philosophical and analytical frameworks in understanding and guiding the development of law.

B. Chapter 2: Background Legal Rules: Common Law Courts and Default Legal Rules

The first year of law school traditionally has revolved around the role of common law courts in developing the legal rules governing adjudication of private disputes. We consider these rules—as developed by common law courts and as codified by modern legislatures or harmonized through restatements—as the foundation for understanding the default governance regime. They form the essential fabric upon which parties assess options. Parties may choose to go beyond these rules in their dealings, they may seek to craft their own governance regimes through contract, or they may, in the absence of constitutional or other limitations, use political processes to override these rules. But these rules, typically as administered by courts, establish default entitlements and remedies.

We have organized the coverage of these rules in both a chronological and practical manner. We begin with the rules governing the general means for acquiring resources—discovery or conquest, adverse possession (in the case of land)—and then examine a range of important resources beyond the context of land—wild animals, water, oil and gas, and intellectual resources (ideas, creative expression and trademarks). The cases and text emphasize how the nature of the resource (is it easily captured by others?) as well as the culture (does the society strongly favor development and will it tolerate substantial differences in wealth?) affect the governance rules. For example, the relative scarcity and abundance of water led to different governance regimes in the west and the east (prior appropriation doctrine versus riparian rights), and the social goal of rewarding productive labor led to the "rule of capture" early in the development of oil and gas law as well as in intellectual property law.

We next examine forms of ownership—present and future interests, as well as concurrent ownership. Although there is not much theoretical cohesion to the particular rules—mostly, we have simply inherited them—certain rights and remedies, such as the Rule Against Perpetuities or the Rule Against Restraints on Alienation, reflect culturally specific policies, such as owner-sovereignty and utilitarianism. After introducing the importance of efficiency through the articles by Coase and Calabresi and Melamed, we also consider rights and limitations on ownership. Trespass is basic in a private property regime—the right to exclude is the most fundamental stick in the bundle

according to the Supreme Court—but common law remedies of injunctive relief are modified by a variety of modern doctrines and statutes (such as good faith improver laws) that seek to achieve other goals. Nuisance also is seen through the lenses of efficiency and transaction costs, especially in the context of multi-party disputes (which may lead to hold-outs and free riders). We introduce takings doctrine through several cases both because of its fundamental importance, but also to show the difference between a liability rule (just compensation) and a property rule (blocking government appropriation of the land), and the limitations of the latter approach. Finally, we look at the restrictions that civil rights laws impose on owner autonomy to achieve social goals wholly apart from efficiency.

The chapter concludes with a unit on the distinctive rules developed for the transfer of property interests—caveat emptor, statute of frauds, title, delivery and foreclosure of security interests. The materials focus on land transactions, although we discuss as well the rules for registration and recordation of other interests, such as intellectual property.

C. Chapter 3: Social Norms

Background legal rules and institutions provide an important part of the governance structure, yet they hardly tell the entire story.

> Most people do not take their disputes to lawyers or judges. Norms, rather than laws, provide the rules of conduct; friends, relatives, and coworkers, rather than juries, make findings of fact; shame and ostracism, rather than imprisonment or legal damages, punish the wrongdoer. Court is held not in a courthouse, but in homes, workplaces, and neighborhoods, among networks of kin, friends, and associates. In a sufficiently close-knit group, where norms are well defined and nonlegal sanctions are effective, the law has little impact on behavior.[30]

This chapter explores the role of social norms and institutions in defining and governing property. In some contexts, social norms and institutions augment and shape the operation of background legal rules, markets and political institutions. In others, they operate independently of these institutions.

Social norms govern resources in a variety of ways. For example, they may influence the propensity of individuals to use formal legal mechanisms. Sociologists have found that many businesspeople involved in long-term relationships will use formal legal sanctions only as a last resort.[31] Social norms similarly operate within families, firms, organizations and religious and

30. Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 133 (1996).

31. *See, e.g.*, Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 64 (1963).

social communities to allocate and enforce property interests and control social behavior.

Unlike the study of formal rules, the study of social norms cannot focus upon statutory codes or court opinions. Rather, the principles underlying their operation must be gleaned from the contexts in which social norms and institutions have developed. We begin with Professor Robert Ellickson's pathbreaking study of the manner in which trespass disputes are handled in a rural ranching community.[32] We then turn to Professor Elinor Ostrom's influential work on how voluntary organizations have evolved to address the tragedy of the commons in a wide variety of "open access" settings.[33] The next two case studies look at the manner in which social norms have addressed the appropriability problems posed by intellectual property,[34] and how formal legal rules have evolved in response to these social institutions.[35] The last case study looks inside the operation of law firms to understand the role social norms play in structuring incentives in the workplace. Through these case studies, students are able to identify the conditions fostering the formation and operation of social norms and institutions, how such norms and institutions evolve, how they interact with formal legal institutions and whether they effectively govern the allocation of property in a particular setting.

D. Chapter 4: Market Institutions

The fourth chapter focuses on the role of markets in allocating rights to material resources. Although a separate first-year course, namely Contracts, deals with market institutions in some detail, this chapter focuses on the distinctive contractual and quasi-contractual rules developed for governance of particular resources. In particular, we focus on landlord-tenant law, the law of non-possessory interests and the law governing common interest communities (such as condominiums, cooperatives and gated communities)—three areas of property law in which contractual instruments are widely if not universally used to reorder the bundle of property rights, and where common law and statutes have significantly constrained the types, content and enforcement of agreements.

Although voluntary agreements underlie each of these areas of property law, such agreements alone could result in intolerable inequities or inefficiencies. In the context of landlord-tenant law, the cases, statutes and materials explore the problems of unequal bargaining power in residential landlord-tenant law and the

32. ELLICKSON, *supra* note 3.

33. OSTROM, *supra* note 3.

34. *See* Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996).

35. *Compare* Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), *with* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994).

common law and statutory responses (such as the warranty of habitability and retaliatory eviction). The law of non-possessory interests allows landowners voluntarily to coordinate land uses to obtain mutually beneficial results—results that might not otherwise be possible without owning much larger tracts of land. However, this area of law is broader than traditional contract law in that agreements made by predecessors can bind successors (real covenants, equitable servitudes). The reason is clear: the high transaction costs that would arise if covenants expired with each change of ownership would quickly lead to inefficient land use arrangements. In the area of easements, the law has developed contractual constructs even in the absence of voluntary agreements. The doctrines of easement by implication and easement by necessity mimic the results of formal agreements, whereas the doctrine of prescriptive easements establishes equivalent rights to serve utilitarian purposes. A new but important kind of easement—the conservation easement—extends the reach of agreements well beyond the contractual nexus to promote specific policy aims. The law of common interest communities is perhaps the most extensive form of contractual property governance, in which individuals create a quasi-democratic system through contractual agreement and live within a hybrid form of governance. Such communities are increasingly common and present novel and difficult challenges to traditional doctrines. Here, we look both at the agreements themselves, as well as at different models of judicial review. This area is also a natural transition to the last chapter, focusing on political institutions.

E. Chapter 5: Political Institutions

This chapter explores the fourth major institutional structure governing the allocation of resources in society—political institutions—particularly in the context of municipal regulation of property rights in land. After looking at important theories of political participation—pluralism, civic republicanism—and the Tiebout Hypothesis for competing municipal governments, we examine the basic tools for land use planning and zoning, as well as the limits imposed by the Takings Clause. The materials and cases illuminate not only the basic rules of zoning law, but also the political dynamics of bargaining, the problems raised by conflicts of interest and the constraints imposed by the Takings Clause. The materials highlight the attributes of political institutions and, coming at the end of the course, foster discussion of the comparative advantages and disadvantages of the full range of resource governance institutions.

III. CONCLUSIONS

The study of property law, along with its centrality to the law school curriculum, has drifted over the past century. Property courses have devolved into disparate sets of loosely connected topics, and the case for treating

Property as an essential building block for the study of law has become more tenuous.

Allowing the property course to recede from the core first-year curriculum, however, would undermine our mission to provide students with a strong foundation and to develop a deep intuitive grasp of the practice of law. Without foundational training and analytical constructs, law school becomes a glorified bar review course and our students would be unprepared to practice in the increasingly diverse world of law.

The challenge to unify the disparate field of property is reminiscent of Goldilocks and the three bears: avoiding porridge that is too hot or too cold. A framework that is too abstract melds the field of property into pure philosophical debate or general discussion of law and public policy. A course without any abstraction offers no framework at all; it is an ad hoc collection of topics and concepts—just another opportunity to learn rules with a vague admonition to "think like a lawyer."

The triadic framework, with its emphasis on the evolution of governance regimes, offers the right balance of abstraction and concreteness. All lawyers today must understand the range of institutions. The governance of most resources provides a rich, comparative laboratory for learning how the principal institutions function. In addition, the variation among resources and the communities in which they are situated provides an opportunity to explore how the nature of the resources and culture influence governance regimes as well as their evolution over time. Thus, even though it is not possible to examine in detail the vast range of resources in any single course, the property course can provide students with a vocabulary, a set of analytical concepts and a range of examples for understanding the key determinants of resource governance.

The triadic relation integrates the many dimensions of property law within a framework that is socially meaningful, intuitively appealing, cohesive and relevant to the multi-faceted nature of being a lawyer—advisor, litigator, dispute resolver, business decision-maker and politician. In so doing, the triadic framework builds a bridge from the origins of the law school curriculum to the modern world, reinvigorating the role of Property in the study of law. It also has the capacity to evolve as resources and institutions change over time.

The triadic relation offers a conception of Property that directly connects to the role that lawyers play in a modern society: creating, implementing and guiding governance structures. Rather than focusing upon one particular resource, such as land, or a particular institution, such as common law courts, the triadic framework emphasizes the portfolio of governance institutions and how they can be deployed to govern the range of resources. The triadic relation provides a balanced appreciation of the full range of institutional settings. Furthermore, by explicitly recognizing the role that culture plays in

structuring institutional approaches, the triadic framework emphasizes the importance of contextual understanding of legal problems. Taking culture seriously is critical to analyzing the needs of particular clients faced with particular problems.